IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 1837 of 2003

with

CRIMINAL MISC.APPLICATION no 1838 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 & 2 YES; 3 to 5 NO

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MOHANLAL SHAMJI SONI

Versus

D N PATEL OR HIS SUCCESSOR IN OFFICE ASSISTANT COLLECTOR

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Appearance:

1. Criminal Misc.Application No. 1837 & 1838 of 2003

MR BB NAIK for Petitioner No. 1

MS MANISHA LAVKUMAR for Respondent No. 1

MR ND GOHIL APP for Respondent No. 2

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CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 10/04/2003

C.A.V. JUDGEMENT

1. These applications, under section 482 of the Code of Criminal Procedure, having the same parties and having raised the same issues for the same reliefs, they were heard together and are disposed by this common judgment.

2. The petitioner has prayed to quash Criminal Cases Nos.929 of 1973 and 930 of 1973 which are pending in the Court of the learned Judicial Magistrate, First Class at Anjar wherein the applicant is charged with the offences punishable under the provisions of Section 135 of the Customs Act, 1962 and section 85 of the Gold (Control) Act, 1968.

3. The applications were pressed mainly on the basis that the petitioner has by now reached the ripe old-age of 80 years even as the criminal cases have been dragging as against him since the year 1973. It appears from the record that the charges were framed against the petitioner in September, 1974 and were altered in the month of March/April, 1976. After the original operation of search and seizure wherein gold and silver were confiscated in the year 1971, the complaint came to be filed in 1973 and, even after the statement of the petitioner being recorded as an accused person in May 1976, the prosecution had applied for permission to examine more witnesses in June, 1976. When such application for additional evidence was rejected by the trial Court and the revision preferred from such order was also rejected in January 1978 by the Sessions Court, the High Court was approached by the prosecution. And, upon the application being allowed by the High Court, the petitioner approached the Supreme Court which confirmed in 1990 the judgment of the High Court. Thus, a new phase of litigation, after about 14 years of framing of the charges, began in the year 1991 and the petitioner was constrained to apply for recalling the witnesses who were already examined. Such applications of the petitioner remained pending in the trial court for about seven years. The orders of the trial court closing the right of the accused to recall the witnesses were, by consent, set aside by the order dated 21.1.2003 of this court and still the problem persisted because the witnesses required to be recalled for cross-examination were not available or could not be served. Ultimately, the matter was struck at the stage when only one remaining witness, namely, Hasmukhlal Ambalal Pandya, could not be cross-examined due to his having migrated to

the Unites States.

4. The learned counsel for the petitioner submitted that the cross-examination of the aforesaid last remaining witness was absolutely necessary for the proper defence of the petitioner and, if the prosecution were directed to supply the new address of that witness, the applicant would request the trial Court to record further cross-examination of that witness by appointment of a Commission under section 284 of the Cr.P.C. Apart from that, the main contention on behalf of the petitioner was that, after such prolonged pendency and prosecution, the petitioner was entitled to be relieved of the proceedings and, on that basis, the proceedings were required to be quashed in the interest of justice in exercise of the inherent powers of this Court.

5. The learned counsel for the petitioner relied upon the Constitution Bench judgment of the Supreme Court in ABDUL REHMAN ANTULAY v. R.S.NAYAK [ (1992) 1 SCC 225] to submit that criminal proceedings must be concluded with reasonable despatch and the burden lies on the prosecution to justify and explain the delay. It was pointed out that in case of inordinate delay in conclusion of the proceedings, the Court has discretion under section 482 of the Cr.P.C. to quash the proceedings having regard to attendant circumstances and relevant factors. Similar observations of another Constitution Bench of the Supreme Court in P.RAMACHANDRA RAO v. STATE OF KARNATAKA [ (2002) 4 SCC 578] were also relied upon to emphasis the ratio of the aforesaid judgment in ABDUL REHMAN ANTULAY (supra) and to submit that the oppressive or unwarranted delay in the facts and circumstances of the present case amounted to violation of Article 21 and, therefore, the trial and the proceedings against the petitioner were liable to be terminated. The learned counsel also relied upon the judgment of the Supreme Court in MAHENDRA LAL DAS v. STATE OF BIHAR [ AIR 2001 SC 2989] which was found to be not applicable in the facts of the present case.

6. Learned counsel for the respondent, Ms.Manisha Lavkumar, submitted that, in the facts of the present cases, the delay, or the major part of it, was attributable to the petitioner himself insofar as his appeal from the judgment of this court remained pending in the Supreme Court from 1978 to 1990 and his application for recalling the witnesses remained pending in the trial court from 1990 to 1999. It was also submitted that the applications for recalling of the witnesses were not pursued with proper despatch and the

present problem of non-availability of the last witness was already overcome by filing a pursis in the trial court to disregard the testimony and examination-in-chief of the sole remaining witness since the prosecution was unable to produce him for cross-examination. That suggestion was also already accepted. It was also submitted that the witness, whose cross-examination was insisted upon by the petitioner, was no more than a formal witness and the prosecution was bound to suffer the consequences of his absence for cross-examination. In these facts and circumstances, the petitions were submitted to be lacking in substance and bona fides.

7. As it is evident from the time and lengthy course that the proceedings have taken so far, the delay and prolonged pendency of the proceedings are not principally attributable to the prosecution and mere delay of such a nature and the old-age of the petitioner cannot be a ground for quashing the proceedings at the fag-end in the facts and circumstances of the cases. As observed by the Constitution Bench of the Supreme Court in ABDUL REHMAN ANTULAY (supra), it is usually the accused who is interested in delaying the proceedings. Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is- who is responsible for the delay ? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. But frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on ex parte representation.....Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution again depends

upon the facts of a given case.....While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on -what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.....Ultimately, the court has to balance and weigh the several relevant factors and determine in each case whether the right to speedy trial has been denied in a given case.....It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint.....Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order - including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded - as may be deemed just and equitable in the circumstances of the case.

8. Following the above ratio and in the peculiar facts and circumstances, the petitions are rejected with a direction that the trial against the petitioner in

Criminal Cases Nos.929 of 1973 and 930 of 1973 shall be, as far as practicable, conducted on day-to-day basis and concluded preferably within a period of two months from today, excluding the period of vacation, if any. Notice is discharged with no order as to costs.

Sd/-

( D.H.Waghela,J.)

(KMG Thilake)